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CITY AND COUNTY OF SAN FRANCISCO and
HEATHER FONG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANDREW COHEN, and individual;
JAMES LEWIS, an individual,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, HEATHER FONG, an
individual, and DOES 1 - 50,

Defendant(s).

Case No. C07-06208 EMC

**DECLARATION OF LAWRENCE
HECIMOVICH IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
(F.R.C.P. 12(b)(6))**

Date: January 30, 2008

Time: 10:30 a.m.

Courtroom: Hon. Edward M. Chen

1 I, LAWRENCE HECIMOVICH, declare as follows:

2 1. I am an attorney of record for Defendants the City and County of San Francisco and
3 Heather Fong, Chief of Police of the San Francisco Police Department, in the above-captioned matter.
4 I am admitted to practice law in California and to appear before this Court. I have personal
5 knowledge of the facts in this declaration, and if called upon to testify, I could and would testify
6 competently to the facts contained herein.

7 2. Attached hereto as Exhibit A is a true and correct copy of the First Amended
8 Complaint, which is the operative complaint, in *Harmston, Cohen, Lewis et al. v. CCSF and Heather*
9 *Fong*, Northern District Case No. C07-01186 SI

10 3. Attached hereto as Exhibit B is a true and correct copy of the District Court's
11 November 6, 2007 Order finding misconduct by Plaintiff Cohen and awarding sanctions against
12 Cohen and Plaintiffs' Attorney Waukeen McCoy in *Harmston, Cohen, Lewis et al. v. CCSF and*
13 *Heather Fong*, Northern District Case No. C07-01186 SI. Cohen has appealed this Order to the Ninth
14 Circuit Court of Appeal.

15 I declare under penalty of perjury under the laws of the State of California that the foregoing
16 is true and correct. Executed this 26th day of December 2007 in San Francisco, California.

17
18 
19 LAWRENCE HECIMOVICH

EXHIBIT A

COPY

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Attorney for Plaintiffs
CLAYTON HARMSTON et al.

**ENDORSED
FILED**
San Francisco County Superior Court

FEB - 1 2007

GORDON PAH-K-LI, Clerk
BY **ELIZABETH ZALDIVAR**
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

CLAYTON HARMSTON, an individual; GIGI
GEORGE, an individual; JAMES LEWIS, an
individual; MIKE EVANSON, an individual,
ERICK SOLARES, an individual; DAVE
PARRY, an individual; ANDREW COHEN,
an individual; NOAH MALLINGER, an
individual; CARLOS MUSTAFICH, an
individual; LUIS DEJESUS, an individual;
JAMES D. AHERNE, an individual; JASON
KIRCHNER, an individual; REGINALD
SCOTT, an individual; GERALD P. LYONS,
an individual; WENDY HURLEY, an
individual; HOLLY STOUMEN, an individual;
CHRISTINE ARNDT, an individual;
SHAREEF NASIR, an individual,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
HEATHER FONG, an individual, and DOES
1-50

Defendants.

Case No. 06-454955

UNLIMITED JURISDICTION

FIRST AMENDED COMPLAINT FOR:

1. RACIAL DISCRIMINATION - CALIFORNIA GOVERNMENT CODE § 12940
2. RACIAL DISCRIMINATION - 42 U.S.C. § 2000(e) et seq. (Title VII of the Civil Rights Act of 1964)
3. RETALIATION
4. RETALIATION - U.S.C. § 2000(e) et seq. (Title VII of the Civil Rights Act of 1964)
5. DEFAMATION
6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

**TWENTY (20) MILLION DOLLARS
DEMANDED**

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. This is an action for damages for Racial Discrimination, Retaliation, Defamation,
3 and Intentional Infliction of Emotional Distress. This action arises out of events involving
4 Plaintiffs CLAYTON HARMSTON et al. (hereafter "Plaintiffs") and Defendant City and County
5 of San Francisco (hereafter "Defendant" or "THE CITY"). Plaintiffs were employed as Peace
6 Officers by the City and County of San Francisco in San Francisco. Therefore, jurisdiction is
7 proper in San Francisco County.

THE PARTIES

8
9 2. Clayton Harmston ("Harmston") is a non-Asian individual employed by THE
10 CITY as a Police Officer. THE CITY has employed HARMSTON for six years, both as a police
11 officer and as a Field Training Officer. In 2003, he received the Medal of Valor and a Purple
12 Heart. The American Legion named him Officer of the Year. HARMSTON has also won the
13 California Peace Officers' Association Valor Award. HARMSTON suffered a pattern and
14 practice of racial discrimination, and other wrongful acts committed by defendants.

15 3. Gigi George ("George") is a non-Asian individual employed by THE CITY as a
16 Police Officer. THE CITY has employed GEORGE for eleven years. Beyond her duties as an
17 Officer, GEORGE has been a liaison between the Police and San Francisco schools, and has
18 worked directly with the Office of the City Attorney. GEORGE suffered a pattern and practice
19 of racial discrimination, and other wrongful acts committed by defendants.

20 4. James Lewis ("Lewis") is a non-Asian individual employed by THE CITY as a
21 Police Officer. THE CITY has employed LEWIS for twenty-four years. LEWIS has spent his
22 career both as an Officer and as a Housing officer for the San Francisco Police. LEWIS suffered
23 a pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

24 5. Mike Evanson ("Evanson") is a non-Asian individual employed by THE CITY as
25 a Police Officer. THE CITY has employed EVANSON for twenty-five years. He has served
26 beyond his duties as an officer, acting as a Field Training Officer and Training Coordinator, and
27 as a Weapon of Mass Destruction Instructor. At the time of his suspension, EVANSON was
28 preparing an officer safety course in response to the recent murder of another Bayview District

1 Police Officer. As well, Officer EVANSON has received a Bronze Medal of Valor, three
2 Meritorious Conduct Awards, eight Police Commission Commendations, two Unit Citations, and
3 over one hundred Captain's Complimentary Reports. EVANSON suffered a pattern and practice
4 of racial discrimination, and other wrongful acts committed by defendants.

5 6. Erick Solares ("Solares") is a non-Asian individual employed by THE CITY as a
6 Police Officer. THE CITY has employed SOLARES for seven years. SOLARES has been a
7 dedicated officer, taking part in the Cease Fire Program, as well as undertaking plainclothes
8 positions and participating in the Robbery Apprehension Team, which responds to bank
9 robberies in progress. SOLARES suffered a pattern and practice of racial discrimination, and
10 other wrongful acts committed by defendants.

11 7. David Parry ("Parry") is a non-Asian individual employed by THE CITY as a
12 Police Officer. THE CITY has employed PARRY for eight years. During his career, PARRY
13 has won the American Legion Police Officer of the Year award (2003), and the Police Officers'
14 Association Medal of Valor (2003). Parry is also a Field Training Officer. PARRY suffered a
15 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

16 8. Andrew Cohen ("Cohen") is a non-Asian individual employed by THE CITY as a
17 Police Officer. THE CITY has employed COHEN for eleven years. During this time, COHEN
18 produced a variety of videos for the Police Department and THE CITY, including documentaries
19 and other satirical videos. COHEN's superiors and peers encouraged his artistic abilities, noting
20 that they were morale boosters for other officers. COHEN suffered a pattern and practice of
21 racial discrimination, and other wrongful acts committed by defendants.

22 9. Noah Mallinger ("Mallinger") is a non-Asian individual employed by THE CITY
23 as a Police Officer. THE CITY has employed the Plaintiffs for nine years. As an officer
24 stationed in the Bayview neighborhood, MALLINGER has volunteered beyond his duties as a
25 police officer. MALLINGER participated in the Police Department's Cease Fire Project, an
26 effort to decrease violence the Bayview neighborhood. As well, he has taken part in gift drives
27 at Bayview Housing, has taken disadvantaged children to sporting events, and has visited ill
28

1 children in local hospitals. MALLINGER suffered a pattern and practice of racial
2 discrimination, and other wrongful acts committed by defendants.

3 10. Carlos Mustafich ("Mustafich") is a non-Asian individual employed by THE
4 CITY as a Police Officer. THE CITY has employed MUSTAFICH for seven years. During this
5 time, MUSTAFICH worked in the Cease Fire Project, an effort to decrease violence the Bayview
6 neighborhood. MUSTAFICH suffered a pattern and practice of racial discrimination, and other
7 wrongful acts committed by defendants.

8 11. Luis DeJesus ("DeJesus") is a non-Asian individual employed by THE CITY as a
9 Police Officer. THE CITY has employed DEJESUS for eight years. During this time,
10 DEJESUS worked in the Cease Fire Project, an effort to decrease violence the Bayview
11 neighborhood. He also volunteered with the Police Athletic League's fishing program. As an
12 officer, he received a Medal of Valor, two Police Commission Commendations, and two
13 Meritorious Conduct awards. DEJESUS suffered a pattern and practice of racial discrimination,
14 and other wrongful acts committed by defendants.

15 12. James D. Aherne ("Aherne") is a non-Asian individual employed by THE CITY
16 as a Police Officer. THE CITY has employed AHERNE for eight years. During this time, he
17 took part in the Cease Fire Project, an effort to reduce violence in the Bayview neighborhood.
18 AHERNE suffered a pattern and practice of racial discrimination, and other wrongful acts
19 committed by defendants.

20 13. Jason Kirchner ("Kirchner") is a non-Asian individual employed by THE CITY
21 as a Police Officer. THE CITY has employed KIRCHNER for four years. During this time, he
22 has been recommended several times for the Medal of Valor. He has received dozens of
23 Captains' Complimentary Reports, and received a Unit Citation for Work and Valor during the
24 Iraq riots. KIRCHNER suffered a pattern and practice of racial discrimination, and other
25 wrongful acts committed by defendants.

26 14. Reginald Scott ("Scott") is a non-Asian individual employed by THE CITY as a
27 Police Officer. THE CITY has employed SCOTT for six years. He earned the Medal of Valor,
28 the Chief's Award, and the Humanitarian award during his time at the Police Department. Prior

1 to his tenure with the San Francisco Police, SCOTT worked in the San Francisco Sheriff's
2 Department. In that position, he was named Deputy of the Year in 1998. SCOTT suffered a
3 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

4 15. Gerald P. Lyons ("Lyons") is a non-Asian individual employed by THE CITY as
5 a Police Officer. THE CITY has employed LYONS for thirteen years. During this time, LYONS
6 served as a plainclothes officer at both the Taraval and Bayview Stations. LYONS suffered a
7 pattern and practice of racial discrimination, and other wrongful acts committed by defendants.

8 16. Wendy Hurley ("Hurley") is a non-Asian individual employed by THE CITY as a
9 Police Officer. THE CITY has employed HURLEY for ten years. HURLEY suffered a pattern
10 and practice of racial discrimination, and other wrongful acts committed by defendants.

11 17. Holly Stoumen ("Stoumen") is a non-Asian individual employed by THE CITY
12 as a Police Officer. THE CITY has employed STOUMEN for six years. In her career,
13 STOUMEN has undertaken a variety of leadership and training positions, including being a Field
14 Training Officer Instructor at the Police Academy. She also taught an Officer Safety and Field
15 Tactics Course focused on schools and the workplace that all San Francisco Police Officers must
16 take. STOUMEN is also a member of the Cease Fire Program. STOUMEN suffered a pattern
17 and practice of racial discrimination, and other wrongful acts committed by defendants.

18 18. Christine Arndt ("Arndt") is perceived to be a non-Asian individual employed by
19 THE CITY as a Police Officer. THE CITY has employed ARNDT for eight years. During her
20 career, she has worked undercover and as a uniformed officer, and has on several occasions
21 requested transfers to work in Bayview, one of the most difficult areas for San Francisco Police.
22 She received many Captain's Complimentary Reports, and a Police Commission Commendation
23 Award. ARNDT suffered a pattern and practice of racial discrimination, and other wrongful acts
24 committed by defendants.

25 19. Shareef Nasir ("Nasir") is a non-Asian individual or perceived to be non-Asian,
26 and employed by THE CITY as a Police Officer. THE CITY has employed NASIR for several
27 years. Plaintiff suffered a pattern and practice of racial discrimination, and other wrongful acts
28 committed by defendants.

1 20. Plaintiffs are informed and believe and thereon allege that THE CITY is a
2 government entity.

3 21. Plaintiffs are informed and believe and thereon allege that defendant HEATHER
4 FONG ("Fong") is an individual employed by THE CITY as Chief of Police.

5 22. Plaintiffs are ignorant of the true names and capacities of defendants sued herein
6 as DOES 1-50, inclusive, and Plaintiffs therefore sue such defendants by such fictitious names.
7 Plaintiffs will amend this Complaint to allege their true names and capacities when ascertained.
8 Plaintiffs are informed and believe and thereon allege that each of these fictitiously named
9 defendants is responsible in some manner for the occurrences, and that such aforementioned
10 defendants' acts and omissions proximately caused the Plaintiffs' injuries as alleged herein.

11 23. Plaintiffs are informed and believe and thereon allege that at all times mentioned
12 herein, each individual defendant was and is the agent, employee and servant of THE CITY and
13 committed the occurrences, acts and omissions complained of herein while acting within the
14 scope of such agency, employment and servitude. Each defendant is responsible for the
15 occurrences, acts and omissions of each other defendant complained of herein.

16
17 **GENERAL ALLEGATIONS**

18 24. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
19 23 above.

20 25. Plaintiffs are informed and believe and thereon allege that THE CITY hired them
21 all as uniformed and plainclothes police officers. Plaintiffs are of various races, including
22 Caucasian, African American, and Latino, but none identifies as Asian. All the Plaintiffs are
23 currently employed by THE CITY.

24 26. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
25 suspended them and otherwise disciplined them and/or subjected them to various adverse
26 employment actions for participating in a satirical video made in late 2005. That video was
27 intended to be a parody of life as Police Officers assigned to the Bayview-Hunter's Point District
28 of San Francisco. Plaintiffs' supervisors knew of, consented to, and required participation by the

1 Plaintiffs in the video. Plaintiffs intended the video to be a morale booster at the Bayview-
2 Hunter's Point Station. THE CITY and FONG did not suspend any of the Plaintiffs' Asian
3 (Chinese-American) co-workers, who also participated in the video.

4 27. Plaintiffs are informed and believe and thereon allege that because of Plaintiffs'
5 participation in the video, THE CITY and FONG suspended them, and required Plaintiffs to turn
6 in their police IDs, badges, and weapons. Because of their suspension, Plaintiffs lost significant
7 amounts of pay, accrual of sick leave, vacation time, and other benefits. Some of the Plaintiffs
8 lost their overtime pay and Field Training Officer pay from the start of their suspension to the
9 present, costing them tens of thousands of dollars in lost earnings.

10 28. Plaintiffs are informed and believe and thereon allege that before, during, and
11 after their suspensions, THE CITY and FONG publicly insulted Plaintiffs, accusing them of
12 being racist, sexist, and homophobic, which is not true. In some cases, defendants posted
13 pictures of Plaintiffs alongside the comments, increasing the humiliation Plaintiffs suffered.
14 Defendants did this repeatedly in print, on the radio, and on television, in local, regional, and
15 national media outlets. Defendants did not make these comments about the Asian officers who
16 participated in the video.

17 29. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
18 acted outside of required protocols and procedures by suspending and insulting Plaintiffs. Rather
19 than conducting a formal investigation, filing charges, or convening a Chief's Hearing, on
20 December 8, 2005, and other dates, THE CITY and FONG groundlessly suspended, and publicly
21 insulted Plaintiffs. This inappropriate response to the video violates the San Francisco Charter
22 and the San Francisco Police Department General Order, requiring a formal investigation, filing
23 of charges, and a hearing underway before the Police Commission for all allegations of
24 misconduct to properly suspend a Police Officer.

25 30. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
26 did not use a valid, non-discriminatory criterion to determine Plaintiffs' discipline. Plaintiffs
27 wrote to Defendants on July 13, 2006 and July 19, 2006 in an attempt to determine Defendants'
28 criterion for disciplining Plaintiffs. Defendants refused to provide any criterion used in

1 Plaintiffs' discipline that justified the omission of Plaintiffs' Asian (Chinese-American)
2 counterparts from any discipline. Defendants failed even to acknowledge Plaintiffs' reasonable
3 requests.

4 31. Plaintiffs are informed and believe and thereon allege that because of the acts of
5 FONG and THE CITY, they have all suffered extreme humiliation and embarrassment. Being
6 suspended from work, losing pay, and being publicly disgraced has taken a great toll on
7 Plaintiffs, including loss of friendships, alienation from family members, and straining
8 marriages, not to mention plaintiffs' personal feelings of fear, shame, and anger.

9 32. Plaintiffs are informed and believe and thereon allege that after plaintiffs filed a
10 Complaint in the instant action an alleged "investigation" occurred and was concluded the week
11 of December 4, 2006.

12 33. Plaintiffs are informed and believe and thereon allege that plaintiffs COHEN,
13 HURLEY, LEWIS, PARRY and HARMSTON received letters requiring a hearing before the
14 Police Commission.

15 34. Plaintiffs are informed and believe and thereon allege that in retaliation for
16 participating in the instant action COHEN must appear before the Police Commissioner as the
17 creator of the video and on grounds of sexual and racial harassment and has been reassigned.

18 35. Plaintiffs are informed and believe and thereon allege that in retaliation for
19 participating in the instant action HURLEY is required to appear before the Police
20 Commissioner for, including but not limited to, an alleged act of racism by handing a
21 watermelon slice to James Lewis, an African-American officer in the parody video. Plaintiffs
22 further contend that Officer Hurley is being retaliated against as Officer Cohen's fiancée.

23 36. Plaintiffs are informed and believe and thereon allege that in retaliation for
24 participating in the instant action LEWIS is required to appear before the Police Commissioner
25 for, including but not limited to, leaving his assigned district, not devoting his whole time to the
26 mission of the police department to protect life and property, conduct reflecting disrespect upon
27 the police force, use of profane language, and gender and sexual harassment based upon his
28 participation in the parody video.

1 37. Plaintiffs are informed and believe and thereon allege that in retaliation for
2 participating in the instant action PARRY is required to appear before the Police Commissioner
3 for, including but not limited to, leaving his assigned district, not devoting his whole time to the
4 mission of the police department to protect life and property, conduct reflecting disrespect upon
5 the police force, and racial harassment in the mocking of Asians in the parody video.

6 38. Plaintiffs are informed and believe and thereon allege that in retaliation for
7 participating in the instant action HARMSTON is required to appear before the Police
8 Commissioner for, including but not limited to, leaving his assigned district, not devoting his
9 whole time to the mission of the police department to protect life and property, conduct
10 reflecting disrespect upon the police force, and racial harassment in the mocking of Asians in the
11 parody video.

12 39. Plaintiffs are informed and believe and thereon allege that the video was only
13 approximately twenty-eight minutes in length.

14 40. Plaintiffs are informed and believe and thereon allege that based upon the alleged
15 "investigation" concluding the week of December 4, 2006, other officers participating in this
16 action were retaliated against based upon their participation in the parody video. EVANSON
17 received a ten-day suspension for profane language and conduct. GEORGE received a letter of
18 reprimand for using her tongue in a sexually explicit manner.

19 41. Plaintiffs are informed and believe and thereon allege that based upon the alleged
20 "investigation" concluding the week of December 4, 2006, ARNDT, STUMAN, KIRCHNER,
21 and NASIR received a five-day suspension based upon pulling their guns in the parody video.

22 42. Plaintiffs are informed and believe and thereon allege that based upon the alleged
23 "investigation" concluding the week of December 4, 2006, DEJESUS received a five-day
24 suspension based upon pulling their toy gun in the parody video.

25 43. Plaintiffs are informed and believe and thereon allege that Lt. Curtis Lum, an
26 Asian received a five-day suspension with two days served and three days held in obedience. He
27 was further transferred from the Bayview station as he was the immediate supervisors of the
28 officers involved in the making of the parody video and was at one time the acting captain. No

1 action was taken against Pai until after Plaintiff filed a Complaint in the instant action alleging
2 racial discrimination.

3 44. Plaintiffs are informed and believe and thereon allege that John Pai, an Asian,
4 also received a reprimand. Pai received a letter of reprimand for having his police baseball cap
5 twisted to the side and allegedly flashing gang signs. No action was taken against Pai until after
6 Plaintiff filed a complaint in the instant action alleging racial discrimination.

7 45. Plaintiffs are informed and believe and thereon allege that Alex Kwan, Derrick
8 Liu, and Eric Chiang, all Asian police officers, participated in the parody video. None of these
9 police officers were reprimanded before or after the allegedly "investigation" occurring the week
10 of December 4, 2006.

11 46. Plaintiffs are informed and believe and thereon allege that Officer Berge, a
12 Caucasian police officer, was suspended for the identical activity of Liu in the video.

13 **FIRST CAUSE OF ACTION AGAINST DEFENDANT THE CITY**

14 **RACE DISCRIMINATION**

15 **Cal. Govt. Code § 12940**

16 **[AS TO ALL PLAINTIFFS]**

17 47. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
18 46 above.

19 48. Defendants, through their agents and employees, engaged in a pattern and practice
20 of unlawful racial discrimination in violation of the Fair Employment and Housing Act
21 (hereinafter referred to as "FEHA") in connection with its treatment of Plaintiffs and the terms
22 and conditions of their employment. Defendants used race as a basis to determine discipline
23 regarding the video. Specifically, Defendants disciplined only the non-Asian officers, and those
24 perceived to be non-Asian, who were involved in the video.

25 49. At all relevant times, defendants had actual and constructive knowledge of the
26 discriminatory conduct described and alleged herein, and condoned, ratified and participated in
27 the discrimination. Because of the hostile and offensive work environment perpetrated and
28

1 maintained by defendants, and their failure to protect Plaintiffs from further discrimination,
 2 Plaintiffs suffered severe emotional distress.

3 50. Plaintiffs are informed and believe and thereon allege that in addition to the
 4 practices enumerated above, defendants, and each of them, have engaged in other discriminatory
 5 practices against Plaintiffs, which are not yet fully known. When said discriminatory practices
 6 become known to Plaintiffs, they will seek leave of court to amend this complaint in those
 7 regards.

8 51. As a direct and proximate result of the willful, knowing, and intentional
 9 discrimination against Plaintiffs, and the failure to act by defendants, Plaintiffs have suffered
 10 mental distress, anguish, and indignation. Plaintiffs are thereby entitled to general and
 11 compensatory damages in an amount to be proven at trial.

12 52. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
 13 conscious disregard of Plaintiffs' rights. As such, punitive damages are warranted against
 14 defendants in order to punish and make an example of their actions.

15 **SECOND CAUSE OF ACTION AGAINST DEFENDANT THE CITY**

16 **RACE DISCRIMINATION**

17 **42 U.S.C. 2000(e) et. seq. (Title VII of the Civil Rights Act of 1964)**

18 **[AS TO ALL PLAINTIFFS]**

19 53. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
 20 52 above.

21 54. Defendants, through their agents and employees, engaged in a pattern and practice
 22 of unlawful racial discrimination in violation of 42 U.S.C. 2000(e) et. seq. (Title VII of the Civil
 23 Rights Act of 1964) in connection with its treatment of Plaintiffs and the terms and conditions of
 24 their employment. Defendants used race as a basis to determine discipline regarding the video.
 25 Specifically, Defendants disciplined only the non-Asian officers, and those perceived to be non-
 26 Asian, who were involved in the video.

27 55. At all relevant times, defendants had actual and constructive knowledge of the
 28 discriminatory conduct described and alleged herein, and condoned, ratified and participated in

1 the discrimination. Because of the hostile and offensive work environment perpetrated and
 2 maintained by defendants, and their failure to protect Plaintiffs from further discrimination,
 3 Plaintiffs suffered severe emotional distress.

4 56. Plaintiffs are informed and believe and thereon allege that in addition to the
 5 practices enumerated above, defendants, and each of them, have engaged in other discriminatory
 6 practices against Plaintiffs, which are not yet fully known. When said discriminatory practices
 7 become known to Plaintiffs, they will seek leave of court to amend this complaint in those
 8 regards.

9 57. As a direct and proximate result of the willful, knowing, and intentional
 10 discrimination against Plaintiffs, and the failure to act by defendants, Plaintiffs have suffered
 11 mental distress, anguish, and indignation. Plaintiffs are thereby entitled to general and
 12 compensatory damages in an amount to be proven at trial.

13 58. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
 14 conscious disregard of Plaintiffs' rights. As such, punitive damages are warranted against
 15 defendants in order to punish and make an example of their actions.

16 **THIRD CAUSE OF ACTION AGAINST**
 17 **DEFENDANTS CITY, FONG, AND DOES 1-50**

18 **RETALIATION**

19 **Cal. Govt. Code §12940**

20 **[AS TO PLAINTIFFS COHEN, HURLEY, LEWIS, EVANSON, PARRY, and**

21 **HARMSTON]**

22 59. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
 23 58 above.

24 60. Plaintiffs are informed and believe and thereon allege that defendants THE CITY
 25 and FONG engaged in retaliatory conduct in violation of public policy against Plaintiffs for
 26 opposing unlawful practices under FEHA.
 27
 28

1 61. Plaintiffs are informed and believe and thereon allege that THE CITY through its
2 agent and employee FONG retaliated against Plaintiffs in violation of California Government
3 Code § 12940.

4 62. Defendants did so by materially changing the employment conditions of
5 Plaintiffs EVANSON, PARRY, and HARMSTON after they filed Notices of Tort Claims for
6 their race discrimination claims related to their suspensions.

7 63. Plaintiffs are informed and believe and thereon allege that on May 31, 2006,
8 Plaintiffs filed Notices of Tort Claims against defendants THE CITY and FONG. On June 20,
9 2006, Plaintiffs EVANSON, PARRY, and HARMSTON were transferred from their previous
10 positions to the O.P.S. Center, and were given different, odd-hour, schedules, in violation of their
11 contracts. Plaintiffs' new positions were regarded as highly undesirable, and their new hours
12 restricted Plaintiffs' ability to provide childcare.

13 64. Plaintiff is informed and believes and thereon alleges that after an alleged
14 "investigation" defendants took further retaliatory action against COHEN, HURLEY, LEWIS,
15 PARRY and HARMSTON by sending a letter of reprimand requiring that they appear before the
16 Police Commissioner to answer various charges as set forth above.

17 65. Plaintiff is informed and believes and thereon alleges that in addition to the
18 enumerated adverse actions above, defendants, and each of them, have engaged in other unlawful
19 practices against COHEN, HURLEY, LEWIS, PARRY and HARMSTON which are not yet
20 fully known. When said practices become known to Plaintiffs, they will seek leave to amend this
21 complaint in those regards.

22 66. As a direct and proximate result of defendants' willful, knowing, and intentional
23 acts, and defendants' failure to act, COHEN, HURLEY, LEWIS, PARRY and HARMSTON
24 have suffered and will continue to suffer mental distress, anguish, and indignation. COHEN,
25 HURLEY, LEWIS, PARRY and HARMSTON are thereby entitled to general and compensatory
26 damages in an amount to be proven at trial.

27 67. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
28 conscious disregard of COHEN, HURLEY, LEWIS, PARRY and HARMSTON's rights. As

1 such, punitive damages are warranted against defendants in order to punish and make an
2 example of them.

3
4 **FOURTH CAUSE OF ACTION AGAINST**
5 **DEFENDANTS CITY, FONG, AND DOES 1-50**

6 **RETALIATION**

7 **42 U.S.C. 2000(e) et. seq. (Title VII of the Civil Rights Act of 1964)**

8 **[AS TO PLAINTIFFS EVANSON, PARRY, HARMSTON,**

9 **COHEN, HURLEY AND LEWIS]**

10 68. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
11 67 above.

12 69. Plaintiffs are informed and believe and thereon allege that defendants THE CITY
13 and FONG engaged in retaliatory conduct in violation of public policy against Plaintiffs for
14 opposing unlawful practices under FEHA.

15 70. Plaintiffs are informed and believe and thereon allege that THE CITY through its
16 agent and employee FONG retaliated against Plaintiffs in violation of 42 U.S.C. 2000(e) et. seq.
17 (Title VII of the Civil Rights Act of 1964).

18 71. Defendants did so by materially changing the employment conditions of
19 Plaintiffs EVANSON, PARRY, and HARMSTON after they filed Notices of Tort Claims for
20 their race discrimination claims related to their suspensions.

21 72. Plaintiffs are informed and believe and thereon allege that on May 31, 2006,
22 Plaintiffs filed Notices of Tort Claims against defendants THE CITY and FONG. On June 20,
23 2006, Plaintiffs EVANSON, PARRY, and HARMSTON were transferred from their previous
24 positions to the O.P.S. Center, and were given different, odd-hour, schedules, in violation of their
25 contracts. Plaintiffs' new positions were regarded as highly undesirable, and their new hours
26 restricted Plaintiffs' ability to provide childcare.

27 73. Plaintiff is informed and believes and thereon alleges that after an alleged
28 "investigation" defendants took further retaliatory action against COHEN, HURLEY, LEWIS,

1 PARRY and HARMSTON by sending a letter of reprimand requiring that they appear before the
2 Police Commissioner to answer various charges as set forth above.

3 74. Plaintiff is informed and believes and thereon alleges that in addition to the
4 enumerated adverse actions above, defendants, and each of them, have engaged in other unlawful
5 practices against COHEN, HURLEY, LEWIS, PARRY and HARMSTON which are not yet
6 fully known. When said practices become known to Plaintiffs, they will seek leave to amend this
7 complaint in those regards.

8 75. As a direct and proximate result of defendants' willful, knowing, and intentional
9 acts, and defendants' failure to act, COHEN, HURLEY, LEWIS, PARRY and HARMSTON
10 have suffered and will continue to suffer mental distress, anguish, and indignation. COHEN,
11 HURLEY, LEWIS, PARRY and HARMSTON are thereby entitled to general and compensatory
12 damages in an amount to be proven at trial.

13 76. Defendants' acts alleged herein are malicious, oppressive, despicable, and in
14 conscious disregard of COHEN, HURLEY, LEWIS, PARRY and HARMSTON's rights. As
15 such, punitive damages are warranted against defendants in order to punish and make an
16 example of them.

17 **FIFTH CAUSE OF ACTION AGAINST**
18 **DEFENDANTS CITY, FONG AND DOES 1-50**
19 **DEFAMATION**
20 **[AS TO ALL PLAINTIFFS]**

21 77. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
22 76 above.

23 78. Plaintiffs are informed and believe and thereon allege that THE CITY and FONG
24 repeatedly publicized, or caused to be publicized, to third persons false allegations concerning
25 Plaintiffs. These false allegations include but are not limited to allegations that they are bigots.

26 79. Plaintiffs are informed and believe and thereon allege that the defendants made
27 accusations directly concerning Plaintiffs and were so understood by all persons involved in the
28 publication.

1 80. Plaintiffs are informed and believe and thereon allege that these accusations were
2 defamatory per se because they accused Plaintiffs of being racist, sexist, and homophobic. The
3 accusations stated above, by natural consequence, cause actual damage to Plaintiffs both
4 personally and professionally.

5 81. Plaintiffs are informed and believe and thereon allege that these accusations were
6 false because Plaintiffs are not racist, sexist, or homophobic.

7 82. Plaintiffs are informed and believe and thereon allege that furthermore, THE
8 CITY and FONG made these accusations knowing that they were false.

9 83. Plaintiffs are informed and believe and thereon allege that as a proximate result of
10 the above-described accusations, Plaintiffs have suffered loss of their reputation, shame,
11 mortification, and hurt feelings, all to their general damage in an amount according to proof.

12 84. Plaintiffs are informed and believe and thereon allege that the above-described
13 accusations were publicized by defendants because of the defendants' rash and irrational
14 response to public pressure. Defendants made the accusations without any investigation, thereby
15 justifying an award of punitive damages against defendants in an amount appropriate to punish
16 defendants for their wrongful conduct and to deter others from engaging in such conduct.

17 **SIXTH CAUSE OF ACTION AGAINST**
18 **DEFENDANTS CITY, FONG AND DOES 1- 50**
19 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
20 **[AS TO ALL PLAINTIFFS]**

21 85. Plaintiffs incorporate by reference the factual allegations of paragraphs 1 through
22 84 above.

23 86. Plaintiffs are informed and believe and thereon allege that THE CITY by and
24 through its agents, employees and defendants FONG and DOES 1-50 acted without regard to the
25 health and safety of Plaintiffs, and each of them treated Plaintiffs in the deplorable manner
26 alleged herein.

27 87. Plaintiffs are informed and believe and thereon allege that Defendants spoke
28 about the video on local and national news outlets. Making public statements regarding a private

1 personnel matter constitutes extreme and outrageous conduct. Furthermore, acting in a
2 discriminatory manner is extreme and outrageous conduct in a civil society.

3 88. Plaintiffs are informed and believe and thereon allege that defendants, standing in
4 a position of authority over Plaintiffs, deliberately acted without regard to Plaintiffs' health,
5 safety, or well-being, causing them severe emotional and physical distress.

6 89. Plaintiffs are informed and believe and thereon allege that as a proximate result of
7 defendants' extreme and outrageous acts, Plaintiffs suffered severe emotional distress in the form
8 of humiliation, embarrassment, mental-anguish, anxiety, stress and indignation. Defendants
9 acted with the willful knowledge that Plaintiffs would suffer severe harm as a result.

10 90. Plaintiffs are informed and believe and thereon allege that defendants' acts alleged
11 herein are malicious, oppressive, despicable, and in conscious disregard of Plaintiffs' rights. As
12 such, punitive damages are warranted against defendants in order to punish them and make an
13 example of their actions.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, PLAINTIFFS pray for relief as follows:

- 16 1. For general damages in excess of twenty (20) million dollars and in no event less
17 than the jurisdictional limit of this court;
- 18 2. For special damages in amounts according to proof;
- 19 3. For punitive damages in amounts according to proof;
- 20 4. For attorneys' fees as provided by law;
- 21 5. For a mandatory injunction requiring defendants to reinstate Plaintiffs to their
22 previous positions without record of the adverse employment actions taken by
23 defendants, pursuant to *Government Code* §12970(a);
- 24 6. For interest as provided by law;
- 25
- 26

27 ///

28 ///

1 ///

2 7. For costs of suit incurred herein; and

3 8. For such other and further relief as the Court deems fair and just.

4
5 Dated: February 1, 2007

LAW OFFICES OF WAUKEEN Q. McCOY

6
7 By 

8 WAUKEEN Q. McCOY

9 Attorney for Plaintiffs
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PROOF OF SERVICE

I declare:

My business address is 703 Market Street, Suite 1407, San Francisco, CA. I am over the age of 18 and am not a party to this action.

On February 1, 2007 I caused to be served:

FIRST AMENDED COMPLAINT

On the party(ies) listed below, addressed as follows:

LAWRENCE HECIMOVICH
ADELMISE WARNER
1390 MARKET ST 5TH FLOOR
SAN FRANCISCO, CA 94103

 X By hand delivery

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2007 at San Francisco, California.

LAW OFFICES OF WAUKEEN Q. McCOY


Mark D Roberts

EXHIBIT B

United States District Court
For the Northern District of California

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4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7
8 CLAYTON HARMSTON, et al.,

No. C 07-01186 SI

9 Plaintiffs,

**ORDER REGARDING VARIOUS
DISCOVERY-RELATED MOTIONS**

10 v.

11 CITY AND COUNTY OF SAN FRANCISCO,
HEATHER FONG, et al.,

12 Defendants.
13 _____/

14 On November 2, 2007, the Court heard oral argument on defendants' motion for a protective
15 order to prevent the deposition of San Francisco Mayor Gavin Newsom, defendants' motion for
16 sanctions for violation of a protective order, plaintiffs' motion to compel San Francisco Police Chief
17 Heather Fong to answer additional questions, plaintiffs' motion to increase the time for Chief Fong's
18 deposition, plaintiffs' motion for sanctions related to Chief Fong's deposition, and plaintiffs' motion
19 to extend the deadline for fact discovery. Having considered the arguments of counsel and the papers
20 submitted, the Court hereby rules as follows.

21
22 **BACKGROUND**

23 Plaintiffs in this case are eighteen police officers, employed by the San Francisco Police
24 Department, who sued the City and Police Chief Heather Fong after they were disciplined and
25 suspended for their involvement in the making of a video that was meant to parody the work of police
26 officers assigned to the Bayview-Hunter's Point District. Plaintiffs, who are self-described "non-Asian
27 individuals," contend that they were disciplined differently, and more harshly, than "Asian police
28 officers" who were also involved in the making of the video.

1 In December 2005, shortly after it was made, the video came to the attention of Chief Fong and
2 San Francisco Mayor Gavin Newsom, who believed the video contained racist, sexist, and homophobic
3 scenes. Newsom and Fong appeared before the press to condemn the video, and Fong temporarily
4 suspended some, but apparently not all, of the police officers involved in making the video. The City
5 and Fong also launched an investigation into the video sometime after it was discovered by Fong. That
6 investigation concluded in December 2006, at which point certain plaintiffs were given additional
7 suspensions as well as other forms of reprimand.

8 This Court previously denied plaintiffs' motion for leave to file an amended complaint adding
9 Mayor Gavin Newsom as a defendant.¹ The Court also granted defendants' motion for judgment on the
10 pleadings regarding, among other things, plaintiffs' defamation claim against Chief Fong for comments
11 made during the joint press conference with Mayor Newsom. Currently before the Court are a number
12 of discovery disputes relating to the taking of Chief Fong's deposition and to the possible taking of the
13 deposition of San Francisco Mayor Newsom.

14
15 **1. Defendants' motion for a protective order**

16 **A. Legal standard**

17 Discovery under Federal Rules of Civil Procedure is "accorded a broad and liberal treatment."
18 *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Parties may obtain discovery regarding any matter, not
19 privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P.
20 26(b)(1). For good cause, the court may order discovery of any matter relevant to the subject matter
21 involved in the action. *Id.*

22 Depositions are generally available without leave of the court. Fed. R. Civ. P. 30(a)(1). Any
23 party may depose "any person, including a party." *Id.* The Ninth Circuit has held, however, that
24 "[h]eads of government agencies are not normally subject to deposition." *Kyle Eng'g Co. v. Kleppe*,
25 600 F.2d 226, 231 (9th Cir. 1979). This rule applies to mayors. *See Trunk v. City of San Diego*, 2007

26
27 ¹Plaintiffs assert in their motion to compel that Mayor Gavin Newsom was a party to this action
28 at the time they noticed his deposition, but that he "has been dismissed." Neither statement is true;
Mayor Newsom has never been a party to this action. Plaintiffs filed a motion to amend their complaint
to add the mayor as a party, but that motion was denied in September 2007.

1 WL 1110715 (S.D. Cal. April 2, 2007); *Marisol A. v. Giuliani*, 1998 WL 132810 *3-4 (S.D. N.Y. March
2 23, 1998). ““An exception to this general rule exists concerning top officials who have direct personal
3 factual information pertaining to material issues . . . where the information to be gained . . . is not
4 available through any other source.”” *Green v. Baca*, 226 F.R.D. 624, 648 (C.D. Cal. 2005) (quoting
5 *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990)).

6 Under Rule 26(c), a party may file a motion for a protective order, and a court may issue an order
7 “that the disclosure or discovery not be had” or “that the discovery may be had only by a method of
8 discovery other than that selected by the party seeking discovery.” Fed. R. Civ. P. 26(c). The Supreme
9 Court has interpreted Rule 26(c) as conferring “broad discretion on the trial court to decide when a
10 protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v.*
11 *Rhinehart*, 467 U.S. 20, 36 (1984).

12
13 **B. Discussion**

14 Defendants have filed a motion for a protective order to prevent plaintiffs from deposing San
15 Francisco Mayor Gavin Newsom. Plaintiffs have not responded directly to the motion but instead have
16 filed their own motion to compel the deposition of Mayor Newsom. Defendants argue that Mayor
17 Newsom has no direct personal knowledge unique to him regarding the facts underlying this case
18 because he was not involved in suspensions or disciplinary actions at issue in this case. Defendants also
19 argue that the plaintiffs have not demonstrated that the information they seek from Mayor Newsom is
20 not available from other sources. Plaintiffs respond that Mayor Newsom has personal knowledge of key
21 aspects of the press conference he held with Chief Fong and that this information cannot be obtained
22 from any other source.

23 As stated above, there is an exception to the rule regarding the deposition of heads of
24 government agencies where an official has “direct personal factual information” that is related to
25 “material issues” and is unavailable “through any other source.” *Green*, 226 F.R.D. at 648. In their
26 motion to compel, the only “direct personal factual information” plaintiffs attribute to Mayor Newsom
27 is knowledge of facts relating to the press conference. This is not enough.

28 The Court has already held as a matter of law that Chief Fong is immune from tort liability

1 arising from the press conference, because the decision to speak to the press on a novel and potentially
2 volatile situation involving the police department qualifies as a discretionary, policymaking decision
3 under California Government Code § 820.2. *See* September 25, 2007 Order [Docket # 48] at 8-9. Thus
4 the press conference itself is not a “material” issue. As to the conduct of the investigation and the
5 discipline imposed, pretextual or otherwise, the San Francisco Charter imposes on Chief Fong, not
6 Mayor Newsom, the authority and responsibility to suspend and discipline police officers. *See* San
7 Francisco Charter §§ A8.343-344. Plaintiffs have not seriously attempted to make arguments to the
8 contrary, other than simply stating (without support) that Mayor Newsom has knowledge related to
9 Chief Fong’s decision to discipline plaintiffs. Under these circumstances, the record does not support
10 a determination that Mayor Newsom is in unique possession of information related to the disciplinary
11 decisions at issue.

12 Even if Mayor Newsom were in possession of such information, plaintiffs have made no attempt
13 to explain why the information cannot be obtained in other ways or from other sources. Defendants
14 argue persuasively that any information Mayor Newsom might have related to the disciplinary decisions
15 of Chief Fong can be discovered through written interrogatories and requests for admission addressed
16 to the City. In fact, plaintiffs have already directed a request for admission to Mayor Newsom.
17 Although he is not a party to the case, the City has responded to this request for admission relating to
18 Mayor Newsom’s knowledge of the underlying facts of the case. Furthermore, plaintiffs have not yet
19 attempted to discover this information through written interrogatories. Plaintiffs have not shown,
20 therefore, that this information is not available through any other source.

21 Because plaintiffs have not demonstrated that Mayor Newsom has personal knowledge of
22 material information that cannot be obtained from another source, the Court finds it proper to uphold
23 the “normal rule” against taking the depositions of heads of government agencies. *Kyle Eng’g Co. v.*
24 *Kleppe*, 600 F.2d at 231; *Green*, 226 F.R.D. at 648. Accordingly, the Court need not reach defendants’
25 assertion that the information plaintiffs seek is protected by the deliberative process privilege. On this
26 record, the Court GRANTS defendants’ motion for a protective order to prevent the deposition of Mayor
27 Newsom and DENIES as moot plaintiffs’ motion to compel said deposition.

2. **Defendants' motion for sanctions for violation of the protective order**

A. **Legal standard**

"A court has power to adjudge in civil contempt any person who willfully disobeys a specific and definite order requiring him to do or to refrain from doing an act." *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983). The Federal Rules of Civil Procedure provide that "if a party fails to obey an order entered under Rule 26(f),² the court . . . may make such orders in regard to the failure as are just, [including] . . . [a]n order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . [or] an order treating as a contempt of court the failure to obey any orders." Fed. R. Civ. P. 37(b)(2)(D). The Court may also "require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Id.* at 37(b)(2).

A court may hold a party in civil contempt only if there is a valid court order that is clear in its commands. *See Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 465 (9th Cir. 1989) (court order must be "specific and definite"). To succeed on a motion for civil contempt, the moving party must "show by clear and convincing evidence that [the nonmoving party] violated the [court order] beyond substantial compliance, and that the violation was not based on a good faith and reasonable interpretation of the [order]." *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997). "The district court may impose a sanction for the contempt only if it finds that the party requesting the sanction has proven contempt by clear and convincing evidence." *Peterson v. Highland Music Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998).

B. **Discussion**

Defendants move the Court to find plaintiff Andrew Cohen and plaintiffs' counsel Waukeen McCoy in civil contempt for their failure to abide by the stipulated protective order regarding discovery

²Rule 26(f) addresses the development of a discovery plan and references "any other orders that should be entered by the court under Rule 26(c)," the rule addressing protective orders. Fed. R. Civ. P. 26(f)(6).

1 matter deemed confidential. In the event the Court finds plaintiffs to be in civil contempt, defendants
2 also ask the Court to impose sanctions by dismissing Cohen's claims, disqualifying McCoy from
3 representing plaintiffs in this matter, and ordering both Cohen and McCoy to pay fees and costs incurred
4 by defendants in bringing this motion. Plaintiffs argue in response that they should not be held in civil
5 contempt because they did not violate the protective order.

6 The dispute arises primarily out of the videotaped deposition of defendant Chief Fong, taken on
7 September 20, 2007, after the parties had stipulated to a protective order. At the start of that deposition,
8 counsel for defendants stated on the record that "defendants are designating the entire transcript of Chief
9 Fong's deposition as a confidential document. Subject to, of course, your objection and the court's
10 ruling ultimately on that." Hecimovich Decl. at ex. Y, page 7. McCoy responded with an objection that
11 "this deposition transcript cannot be marked as confidential. It's not a document that you're producing,
12 it is witness' testimony and this witness' testimony is being made under oath. So that's our objection
13 to that." *Id.*

14 In determining whether the protective order was violated, the Court will read the order "in a
15 reasonable and common sense manner." *On Command Video v. Lodgenet Entm't Corp.*, 976 F. Supp.
16 917, 921 (N.D. Cal. 1997). The parties in this case entered into a stipulated protective order on August
17 20, 2007, one month prior to the September 20, 2007 deposition of Chief Fong at issue in this motion.
18 Stipulated Protective Order ("Protective Order") [Docket # 29]. The protective order signed by the
19 parties covers deposition testimony because it applies to "information (regardless of how generated,
20 stored, or maintained)," *id.* at § 2.3, and because it specifically explains the procedure "for testimony
21 given in deposition," *id.* at § 5.2(b). That is, a party seeking to protect deposition testimony must
22 "identify on the record, before the close of the deposition . . . all protected testimony, and further specify
23 any portions of the testimony that qualify as 'CONFIDENTIAL.'" *Id.* Alternatively, "[w]hen it is
24 impractical to identify separately each portion of testimony that is entitled to protection, and when it
25 appears that substantial portions of the testimony may qualify for protection," the party providing the
26 testimony "may invoke on the record (before the deposition or proceeding is concluded) a right to have
27 up to 20 days to identify the specific portions of the testimony as to which protection is sought and to
28 specify the protection being asserted – 'CONFIDENTIAL.'" *Id.*

1 The protective order states that a party “must take care to limit any such designation [of
2 confidentiality] to specific material that qualifies under the appropriate standards” and that “[m]ass,
3 indiscriminate, or routinized designations are prohibited.” *Id.* at § 5.1. If a party improperly designates
4 material as confidential, that party may be exposed to sanctions. *Id.* Notwithstanding this provision,
5 the protective order is clear that “[u]ntil the court rules on [a challenge to a party’s designation], all
6 parties shall continue to afford the material in question the level of protection to which it is entitled
7 under the Producing Party’s designation.” *Id.* at § 6.3. The protective order also lays out in precise
8 terms the method by which a party may challenge a designation of confidentiality. First, the challenging
9 party “must begin the process by conferring directly . . . in voice to voice dialogue . . . with counsel for
10 the Designating Party.” *Id.* at § 6.2. If the parties cannot come to an agreement, the challenging party
11 “may proceed to the next stage of the challenge,” *id.*, which involves the filing and serving of “a motion
12 under Civil Local Rule 7 . . . that identifies the challenged material and sets forth in detail the basis for
13 the challenge,” *id.* at § 6.3. Protected material may be used “only for prosecuting, defending, or
14 attempting to settle this litigation” and may be disclosed only to certain categories of persons. *Id.* at §
15 7.1; *see also id.* at § 7.2.

16 Defendants’ primary contentions, which plaintiffs do not dispute in their declarations, are that
17 (1) on or about September 19, 2007, plaintiff Cohen posted on his website an interview summary
18 document designated as confidential by defendants; (2) on September 27, 2007, Cohen filed an internal
19 complaint with the San Francisco Police Department that included “an edited version of the video of
20 Chief Fong’s deposition” as evidence supporting the allegations in the internal complaint, Hecimovich
21 Decl. at ex. W; (3) sometime between the afternoon of September 20 and the morning of September 21,
22 plaintiffs’ counsel McCoy provided or showed a copy of the videotaped deposition to a reporter for
23 ABC News; and (4) McCoy filed in the Court’s public record confidential excerpts from Chief Fong’s
24 deposition transcript without attempting to file under seal. There is no dispute between the parties that
25 the materials in question were actually disclosed to the news media, the Internet, the public record, or
26 the police department. For example, the Bay Area affiliate of ABC News showed portions of Chief
27 Fong’s deposition during a broadcast on September 21, 2007, and continues to feature video clips of the
28 deposition on its website. *See* ABC 7 News, “Chief Heather Fong Points the Finger at Newsom,” *at*

1 http://abclocal.go.com/kgo/story?section=i_team&id=5669657 (9/21/07); ABC 7 News Blog, "Lawyers
2 Gone Wild," at <http://iteamblog.abc7news.com/2007/09/lawyers-gone-wi.html> (9/21/07).

3 The Court agrees with defendants that both Cohen and McCoy violated the clear terms of the
4 protective order. At the start of Chief Fong's deposition, counsel for defendants stated on the record
5 that "defendants are designating the entire transcript of Chief Fong's deposition as a confidential
6 document. Subject to, of course, your objection and the court's ruling ultimately on that." Hecimovich
7 Decl. at ex. Y, page 7. This statement satisfies the requirement that the designating party identify on
8 the record the protected testimony or the right to have up to 20 days to designate specific portions of the
9 testimony as confidential. *See* Protective Order at § 5.2(b). Once designated as such, the parties were
10 required to "afford [Chief Fong's testimony] the level of protection to which it is entitled under the
11 Producing Party's designation," *id.* at § 6.3, i.e. confidential. This means that Chief Fong's testimony
12 was to be treated as confidential unless and until plaintiffs put forth an appropriate challenge to the
13 designation and the Court had an opportunity to rule on that challenge. *Id.* at §§ 6.1-6.3. The protective
14 order is clear that the proper procedure was for plaintiffs to first meet and confer with defendants and
15 then to file a motion under Civil Local Rule 7 challenging defendants' designation of the material as
16 confidential. *Id.* None of these procedures were followed in this case. Even if the Court were to
17 construe plaintiffs' September 26, 2007 letter as a properly filed motion in accordance with § 6.3 of the
18 protective order, the Court has not yet "rule[d] on the challenge," either to defendants' designation of
19 the whole of Chief Fong's testimony as confidential or to defendants' subsequent designation of certain
20 portions as confidential within the 20-day window. Accordingly, Chief Fong's testimony was and is
21 to be treated as confidential, until the Court rules that it is not. *See id.* at § 6.3.

22 Instead of following the procedures laid out in the protective order, Cohen and McCoy evidently
23 decided that because they thought defendants' counsel did not have grounds to designate the whole of
24 Chief Fong's deposition testimony as confidential, they could ignore the order without bringing the
25 proper challenge to this Court. They now argue that defendants' counsel either improperly designated
26 the entire deposition testimony as protected, or did not properly invoke the right to have 20 days to
27 designate portions of the testimony as confidential. This argument is beside the point. Even assuming
28 defendants did not properly invoke the 20-day procedure for designating specific portions of the

United States District Court
For the Northern District of California

1 testimony as confidential, it is clear from their statements on the record that defendants were designating
2 "the entire transcript of Chief Fong's deposition as a confidential document." *Id.* It may be that the
3 designation was improper and would subject defendants to the possibility of sanctions under § 5.1 of
4 the protective order, but under the terms of the protective order that designation, even if later determined
5 to be improper, remains in place until the Court orders otherwise after a properly-presented challenge.
6 See Protective Order at § 6.3. For this reason, McCoy violated the protective order and the designation
7 of confidentiality when he provided Chief Fong's testimony to the news media and filed it as part of the
8 public record, and Cohen violated the order when he provided the testimony to an officer of the police
9 department and posted on his website a separate document designated as confidential. *See id.* at §§ 7.2,
10 10.³ At the time of these disclosures, the Court had in no way overruled defendants' designations.

11 The Court finds that the evidence demonstrating that Cohen and McCoy violated the protective
12 order is clear and convincing; indeed, the evidence of the conduct charged is unchallenged. The Court
13 therefore finds Cohen and McCoy in civil contempt, pursuant to Federal Rule of Civil Procedure
14 37(b)(2)(D). The protective order agreed to by the parties and signed by the Court was valid and clear
15 in its commands, *see Balla*, 869 F.2d at 465, specifically stating that "[u]ntil the court rules on the
16 challenge, all parties shall continue to afford the material in question the level of protection to which
17 it is entitled under the Producing Party's designation," Protective Order at § 6.3. Cohen and McCoy
18 were not in substantial compliance with the protective order because they distributed material designated
19 as confidential about as widely as possible, to both the Internet and a television news station. They also
20 cannot rely on a good faith and reasonable interpretation of the protective order. *Wolfard Glassblowing*
21 *Co.*, 118 F.3d at 1322. McCoy's initial reason for disobeying the protective order – as he stated during
22 the deposition itself – was that depositions are not covered. Hecimovich Decl. at ex. Y, page 7. As
23 discussed above, this interpretation is in no way supported by the plain language of the protective order.
24

25 ³McCoy also objects that defendants' designations of confidentiality are overbroad and infringe
26 plaintiffs' First Amendment rights. It is important to note that the Court is not at this time deciding
27 whether defendants' designations qualify as material that should be protected. The Court can make that
28 decision only after plaintiffs have met and conferred with defendants regarding the challenged material,
see Protective Order at § 6.2, and have filed the proper motions in accordance with § 6.3. The protective
order is clear that material designated as confidential is to be treated as such until the Court rules
otherwise, regardless whether the parties were justified in their designations.

1 See Protective Order at §§ 2.3, 5.2(b). The second reason put forth by plaintiffs for not obeying the
2 protective order is that defendants' designation of confidentiality was too broad. This interpretation
3 finds no support in the plain language of the order, given that a confidential designation remains in place
4 until the Court rules otherwise. *Id.* at § 6.3.⁴

5 The Court also agrees with defendants that sanctions for this contempt are appropriate to
6 compensate defendants for plaintiffs' noncompliance. See *Shuffler*, 720 F.2d at 1147; Fed. R. Civ. P.
7 37(b)(2). Because the affidavits are uncontroverted and the parties agree as to what transpired (though
8 not as to their interpretations of the protective order), the Court need not hold an evidentiary hearing
9 prior to ordering sanctions. *Highland Music, Inc.*, 140 F.3d at 1324. Defendants have proven contempt
10 by clear and convincing evidence, and the parties do not dispute that the materials in question were
11 disseminated. *Id.* at 1323. The Court therefore orders Cohen and McCoy to pay defendants' reasonable
12 expenses, including attorney's fees, which totals \$24,407.42 based on the declarations of defendants'
13 counsel.⁵ Payment of \$24,407.42 shall be made by November 30, 2007.

14 Defendants also ask that the Court sanction McCoy by forbidding him from representing the
15 plaintiffs in this matter and sanction Cohen by dismissing his claims against defendants. The Court
16 declines to order these other, far more drastic sanctions, as the Court believes that monetary sanctions
17 are adequate and prefers to dispose of this case on its merits. See *Ferdik v. Bonzelet*, 963 F.2d 1258,
18 1260-61 (9th Cir. 1992); *N. Am. Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir.
19 1986).

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24 ⁴ It should be noted that defendants' counsel stated this precise rule when he designated the
25 testimony as confidential, saying that his designation was "[s]ubject to . . . your objection and the court's
26 ruling ultimately on that." Hecimovich Decl. at ex. Y, page 7. Thus, even if McCoy had forgotten the
rules laid out in the protective order he had signed just one month earlier, he was reminded of this rule
during the deposition itself on September 20, 2007, one day before providing the deposition to ABC
News.

27 ⁵The declarations supporting defendants' reasonable expenses are unchallenged. In addition,
28 the Court finds that the hours and hourly rates identified in the declarations are reasonable under the
circumstances.

1 **3. Plaintiffs' motion to compel further deposition testimony, and related motions**

2 **A. Legal standard**

3 Discovery under the Federal Rules of Civil Procedure is "accorded a broad and liberal
4 treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Parties may obtain discovery regarding any
5 matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R.
6 Civ. P. 26(b)(1). For good cause, the court may order discovery of any matter relevant to the subject
7 matter involved in the action. *Id.*

8 Depositions are generally available without leave of the court. Fed. R. Civ. P. 30(a)(1). Any
9 party may depose "any person, including a party." *Id.* A motion to compel is appropriate when "a
10 deponent fails to answer a question propounded or submitted under [Federal Rule of Civil Procedure]
11 30." Fed. R. Civ. P. 37(a)(2)(B). The movant must certify that it has in good faith conferred or
12 attempted to confer with the party failing to make discovery in an effort to secure information or
13 material without court action. *Id.*; *see* Civil L.R. 37-1.

14 If a motion to compel is granted, the court shall require the party whose conduct necessitated the
15 motion to pay the moving party the reasonable expenses incurred in making the motion, including
16 reasonable attorney's fees, unless it finds the opposition was "substantially justified" or other
17 circumstances make such award "unjust." Fed. R. Civ. P. 37(a)(4)(A). In addition, "[i]f the court finds
18 that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may
19 impose upon the persons responsible an appropriate sanction, including the reasonable costs and
20 attorney's fees incurred by any parties as a result thereof." Fed. R. Civ. P. 30(d)(3).

21
22 **B. Discussion**

23 Plaintiffs have filed motions to compel further deposition testimony of defendant Chief Fong,
24 to increase the deposition time of Chief Fong, to sanction defendants' counsel for their conduct during
25 the deposition of Chief Fong, and to extend the discovery period by two months. Defendants object that
26 all of these motions should be denied on the grounds that plaintiffs failed to comply with Civil Local
27 Rule 7-2(A), which requires motions to be filed at least 35 days prior to the day the motioned is
28 calendared. Plaintiffs filed their motions on October 12, 2007, but noticed the motions for November

1 2, 2007, a window of only 21 days. Under normal circumstances, plaintiffs' motion would have been
2 improperly filed. Here, however, the Court noted during the case management conference on September
3 27, 2007, that defendants could bring their motion for sanctions on an expedited schedule to be heard
4 November 2, 2007; the Court also stated that plaintiffs could bring their motion for sanctions at that time
5 as well. Because it was the Court's intention to address all of the various discovery-related issues raised
6 by both parties on November 2, the Court will reach the merits of plaintiffs' motions and not overrule
7 them based on the alleged procedural deficiency. The parties are reminded, however, that absent
8 stipulation or the approval of the Court, they must continue to follow the mandates of Local Civil Rule
9 7-2.

10 Plaintiffs move the Court to compel Chief Fong to answer certain questions that she was advised
11 not to answer during the first deposition session on September 20, 2007. Plaintiffs argue that it was
12 improper for defendants' counsel to instruct Chief Fong not to answer questions regarding (1) whether
13 she had received or reviewed certain documents and (2) whether she believed she had violated local
14 statutes and regulations. Defendants respond that Chief Fong did answer some of these questions and
15 that to the extent she did not it was due to a valid need to preserve the attorney-client privilege.

16 As to the first set of questions, the Court cannot determine whether there was a need to preserve
17 the attorney-client privilege with regard to plaintiffs' question of why Chief Fong did not review the
18 suspension letters. *See Fong Deposition at 25.* The parties have not provided the Court with any
19 indication of what those suspension letters were or why the question would or would not involve the
20 attorney-client privilege. Plaintiffs also urge the Court to compel Chief Fong to answer a question about
21 whether she had reviewed defendants' responses to plaintiffs' form interrogatories. *Id.* at 32. The Court
22 DENIES plaintiffs' motion with respect to this question because Chief Fong did answer when she stated
23 that she did not personally respond to the interrogatories. *Id.* at 33:14-16.

24 The second set of questions involve Chief Fong's knowledge of whether she violated local
25 statutes and regulations. Chief Fong answered plaintiffs' question as to whether she was required to
26 follow the San Francisco Charter. *See id.* at 81. Chief Fong also made clear that she could not answer
27 each of the remaining two questions at issue here because doing so would require the disclosure of
28 attorney-client communications about the legality of her actions. That is, plaintiffs asked Chief Fong

1 whether she thought she had violated various local rules, and Chief Fong stated each time that her
2 understanding of the rules and whether she violated them was based on confidential communications
3 with her attorney. *See id.* at 116, 118. The Court agrees that these answers, if based on Chief Fong's
4 discussions with counsel, would disclose privileged communications and that Chief Fong therefore is
5 not required to answer. For these reasons, the Court DENIES plaintiffs' motion to compel.

6 Plaintiffs also ask the Court to increase the length of Chief Fong's deposition from the standard
7 seven hours, but do not provide any indication of how much time they actually request. The Court finds
8 that plaintiffs' request is premature at this juncture because plaintiffs have deposed Chief Fong for only
9 three hours. Plaintiffs are advised to depose Chief Fong for the four hours that remain. If, after taking
10 a full seven hours of deposition, plaintiffs believe that two or three additional hours are needed,
11 plaintiffs may move for an enlargement at that time. Plaintiffs should be aware, however, that the Court
12 has no intention of granting plaintiffs leave to depose Chief Fong for four days, as initially suggested
13 by plaintiffs' counsel in a letter to defendants. Plaintiffs are also advised that should they feel the need
14 to request additional time, they must attempt in good faith to meet and confer with defendants and, if
15 no resolution can be reached by the parties, must request a specific amount of time and must describe
16 why the enlargement is necessary. *See Civil Local Rule 16-2(d).*

17 Finally, plaintiffs ask the Court to order defendants to pay sanctions for their counsel's behavior
18 during the deposition of Chief Fong, while defendants move for sanctions against plaintiffs for their
19 counsel's refusal to meet and confer regarding the scheduling of plaintiffs' motions. The Court is aware
20 that the pretrial discovery period has not reflected the finest professional hour of either counsel. Chief
21 Fong's deposition, for example, found counsel reacting, and over-reacting, to one another in ways which
22 effectively stymied completion of the deposition, and similar conduct has occurred in other depositions.⁶
23 Because both parties participated in achieving this result, the Court does not believe that assessing
24 monetary sanctions against either would be appropriate at this time. However, based on the
25 uncontroverted record before it, the Court finds that these are "exceptional conditions" which require
26

27 ⁶This Court has already been contacted on several occasions during depositions to referee
28 disputes. Both counsel have asserted that because the lawyers are talking over one another, the
deposition transcripts will not accurately reflect the proceedings.

1 the appointment of a special discovery master to oversee discovery and insure that the parties behave
2 properly during depositions and other interactions. Fed. R. Civ. P. 53(a)(1)(B)(i); Civ. Local Rule 11-
3 6(a)(2); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 560-61 (N.D. Cal. 1987); *Good*
4 *Stewardship Christian Ctr. v. Empire Bank*, 341 F.3d 794, 797-98 (8th Cir. 2003).


5 Accordingly, the parties are hereby notified pursuant to Federal Rule of Civil Procedure 53(b)(1)
6 that the Court intends to appoint a special master on or after November 16, 2007, and intends to order
7 that the cost of the special master initially be borne equally by the parties, subject to re-allocation for
8 good cause shown. **The parties may file any responses to this notice, including suggestions of**
9 **candidates for appointment, in writing no later than November 15, 2007.** The Court intends to rule
10 on plaintiffs' motion to extend discovery after consulting with the discovery master, who will inform
11 the Court whether additional time for discovery is necessary.

12 13 CONCLUSION

14 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants'
15 motion for a protective order relating to the deposition of Mayor Newsom [Docket # 50] and DENIES
16 as moot plaintiffs' motion to compel the deposition [Docket # 72]. The Court GRANTS defendants'
17 motion to find Cohen and McCoy in civil contempt for violating the stipulated protective order and
18 orders them to pay defendants' reasonable expenses [Docket # 66]. The Court DENIES plaintiffs'
19 motion to compel Chief Fong to answer additional questions and for sanctions, and DENIES without
20 prejudice plaintiffs' motion to increase the length of time for Chief Fong's deposition [Docket # 71].
21 The Court NOTIFIES THE PARTIES that it intends to appoint a special master to oversee discovery,
22 pursuant to Federal Rule of Civil Procedure 53 and Local Rule 11-6, and that it will accept responses
23 to this notice, including suggestions of candidates for appointment, on or before November 15, 2007.

24 **IT IS SO ORDERED.**

25
26 Dated: November 6, 2007

27 
28 SUSAN ILLSTON
United States District Judge